IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. ELIZABETH MARY SHULKIN, Appellee.	2 CA-CR 2006-0128 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20052785

Honorable Charles S. Sabalos, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Taren M. Ellis — Tucson
Attorneys for Appellant

Matthew H. Green — Tucson

and

Stephen Paul Barnard — Tucson
Attorneys for Appellee

V Á S Q U E Z, Judge.

¶1 The state appeals from the trial court's grant of Elizabeth Shulkin's motion to suppress evidence, a ruling we review for an abuse of discretion. *See State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001). "We view the evidence presented at the suppression hearing in the light most favorable to upholding the trial court's factual findings, but review its legal conclusions de novo." *Id*. For the reasons given below, we find no abuse of discretion here.

Background

¶2 In June 2005, a police sergeant acting on a telephoned tip stopped Shulkin's vehicle because he suspected she was driving under the influence of an intoxicant (DUI). Three children were inside the vehicle. The officer smelled a slight odor of intoxicants and Shulkin stumbled slightly after she got out of the vehicle. She told the officer she had had a drink "earlier." Another officer administered a preliminary breath test, which indicated the presence of alcohol in Shulkin's system. This officer reported he had observed that Shulkin had bloodshot and watery eyes, a moderate odor of alcohol about her person, and that her face was flushed. He arrested her for DUI and took her to the police substation.

¶3 Shulkin consented to have a sample of her blood drawn and tested for its alcohol concentration. A third officer, Widener, performed the blood draw in the police interview room. Widener cleaned the back of Shulkin's right hand with providone iodine, inserted a butterfly needle, and withdrew two vials of blood. Shulkin was later indicted on three counts each of child abuse and aggravated DUI based on the presence of a minor.

¶4 Shulkin filed a motion to suppress the results of the analysis of her blood, arguing "[t]he procedure used by Officer Widener is not within the scope of accepted medical practice . . . and exposed [her] to an increased risk of complications and pain" in violation of her constitutional right to be free from an unreasonable search. After a hearing, the trial court granted the motion, finding that "the manner in which Officer Widener drew [Shulkin's] blood was not in conformity with established phlebotomy safety protocols and thereby subjected [Shulkin] to an unreasonable risk of harm."

¶5 The state argues this ruling was an abuse of discretion because Shulkin "made no showing that the procedures used by Officer Widener invited an unjustified element of personal risk of infection and pain." Shulkin, however, argues that the evidence showed that Widener had used a nonstandard, potentially more painful technique, exposing her to "unjustifiable risk of injury and pain."

Discussion

¶6 "The drawing of blood is a bodily invasion and, thus, constitutes a search under the Fourth Amendment." *State v. Estrada*, 209 Ariz. 287, ¶ 11, 100 P.3d 452, 455 (App. 2004). As she did below, Shulkin relies on *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966),[1] in arguing that the manner in which Widener drew her blood was unreasonable. In *Schmerber*, the Supreme Court stated that it must determine "whether the means and procedures employed in taking [the defendant's] blood respected relevant Fourth

[1]Although *Schmerber* involved a nonconsensual blood draw, the state does not argue that its reasonableness standard does not apply here because Shulkin consented to the blood draw.

Amendment standards of reasonableness." *Id*. at 768, 86 S. Ct. at 1834. The Court noted that a blood test itself is reasonable because it generally "involves virtually no risk, trauma, or pain." *Id*. at 771, 86 S. Ct. at 1836. The Court also found that, in that case, the test had been performed in a reasonable manner because the blood "was taken by a physician in a hospital environment according to accepted medical practices." *Id.*

¶7 The Court further noted that

> serious questions . . . would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Id. at 771-72, 86 S. Ct. at 1836. Finally, the Court stated: "That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.* at 772, 86 S. Ct. at 1836; *see also Winston v. Lee*, 470 U.S. 753, 761, 105 S. Ct. 1611, 1617 (1985) (noting that "all reasonable medical precautions were taken and no unusual or untested procedures were employed in *Schmerber*").

¶8 Shulkin argued below that her blood draw was unreasonable because it was not done by qualified medical personnel in a clinical environment and because it was not done according to accepted medical practices. Specifically, Shulkin asserted that Widener had used a "riskier and more painful" technique than normal by using a butterfly needle, that

the blood draw was not done under the proper sanitary conditions, and that the officer was not properly supervised. The trial court granted Shulkin's motion solely on the ground that the manner in which the officer drew her blood was unreasonable because it did not conform to "established phlebotomy safety protocols." Thus, we first consider the propriety of this factual finding.

¶9 During the hearing on the motion, Widener testified that he had attended a five-day course on "Phlebotomy for Law Enforcement." Defense counsel questioned Widener about excerpts from the textbook used in the course, eliciting that, according to the textbook, "[t]he most common and preferred system for collecting blood samples is the evacuated tube system."[2] The butterfly technique Widener used apparently does not use an evacuated tube and was from the back of Shulkin's hand. When asked whether a patient having blood drawn with this technique caused a patient to feel "an increased level of discomfort," Widener replied that "[i]t would depend on the situation." But he then agreed that "under normal circumstances . . . a person's hands can have sensitivity."

¶10 Defense counsel also elicited testimony from Widener that, according to the textbook, the butterfly technique may be used when necessary on people with "small or fragile" veins when a first blood draw attempt is unsuccessful. Also, according to the textbook as read by Widener at the hearing, "A phlebotomist may elect to use a . . . butterfly . . . when drawing blood from difficult adult veins such as small antecubital veins or wrist

[2]According to Widener, an evacuated tube system consists of a needle, the needle holder, and a tube that fills with blood automatically.

or hand veins."[3] Widener agreed that Shulkin did not appear to be "overly small." When asked about why he chose to use this particular technique, Widener said that the butterfly technique requires less probing. He further testified that, for that reason, he preferred the butterfly technique and that it was a "good possibility" the majority of his blood draws were done using that technique. Widener also agreed that he could not say whether he had even considered and ruled out an antecubital blood draw with an evacuated tube system to draw Shulkin's blood.

¶11 The trial court asked defense counsel, "What is there about the manner in which Officer Widener drew [Shulkin's] blood that was . . . not in conformity with established phlebotomy safety protocols; and how did it subject [her] to an unreasonable risk of harm if there was a violation of protocol?" Defense counsel answered that the textbook says the technique Widener used was not the most common and preferred technique. Counsel also stated Widener had acknowledged that his chosen technique involved the potential for increased pain. Counsel also asked the court to take judicial notice of expert testimony in another case about "proper blood draw procedure." However, the court stated: "I don't think I can take judicial notice of it in terms of its application to this case. That case was different. It is another matter." Later, when asked about the other case, the prosecutor asserted that "any decision on this case should be based on the circumstances of this case and is a separate analysis." The court replied: "I agree. That is

[3] "Antecubital" is that part of the arm opposing the elbow. *Stedman's Medical Dictionary* 78 (3d lawyers' ed. 1972).

how I plan to rule." Thus, because it appears the court did not consider the expert testimony in the other case when determining whether Widener's technique complied with phlebotomy safety protocols, we do not consider it either as it was not evidence presented at the suppression hearing. *See State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005).

¶12 Accordingly, we consider only the evidence presented at the suppression hearing, namely Widener's testimony. Widener acknowledged the potential for increased pain by using the butterfly technique and said the textbook used in the phlebotomy course he attended discussed using that technique when the person had small or difficult veins, which was apparently not the case with Shulkin. Viewing this evidence in the light most favorable to upholding the trial court's factual finding that the manner in which the officer drew Shulkin's blood did not comply with established phlebotomy safety protocols, as we must, we conclude this finding is supported by the record and not clearly erroneous. *See id*. (appellate court defers to trial court's factual findings supported by record and not clearly erroneous); *see also Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d at 453 (same). However, the ultimate issue of whether the blood draw complied with the Fourth Amendment's reasonableness requirement is a legal conclusion that we review de novo. *Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d at 453.

¶13 The state asserts that the blood draw in this case was not done in an unreasonable manner, comparing the technique employed by Widener with that of the phlebotomist in *People v. Esayian*, 5 Cal. Rptr. 3d 542 (Ct. App. 2003). However, in *Esayian*, the phlebotomist drew blood from the defendant's arm, not the hand as was the

case here. *Id*. at 546. Furthermore, in finding that the blood draw at issue complied with the Fourth Amendment's requirement of reasonableness as described in *Schmerber*, the court noted in *Esayian* that the record showed the blood was drawn "in the same manner as blood is regularly drawn in ordinary blood tests," *id*. at 547, and did not subject the defendant "to any unusual pain or indignity," *id*. at 550. In contrast, in a finding to which we defer, *see May*, 210 Ariz. 452, ¶ 4, 112 P.3d at 41, the trial court in this case found that Widener had used a technique that did not conform with established phlebotomy safety protocols and thus subjected Shulkin to an unreasonable risk of harm. Therefore, *Esayian* does not support the state's position that the blood draw here was reasonable.

¶14 The state has not cited any case, nor have we found any, in which a blood draw performed in a manner a court determined was unsafe and exposed the individual to an unreasonable risk was found to comply with the Fourth Amendment's requirement of reasonableness. *Cf. United States v. Bullock*, 71 F.3d 171, 176 (5th Cir. 1995) (noting defendant had "presented no evidence that the method of blood . . . withdrawal was not in conformity with accepted medical practice or that it exposed him to unacceptable risk or pain"); *Esayian*, 5 Cal. Rptr. 3d at 550 (noting no evidence in record contradicted trial court conclusion blood draw properly performed); *State v. Daggett*, 640 N.W.2d 546, ¶ 17 (Wis. Ct. App. 2001) (noting no evidence that blood draw was performed in a manner that endangered person's health).

¶15 The trial court here concluded that the manner in which Widener drew Shulkin's blood was unsafe and subjected her to an unreasonable risk of harm. The court

then concluded that this increased risk of harm rendered the blood draw unreasonable under the Fourth Amendment. Given this record, we cannot say the court's ruling was an abuse of discretion. *See May*, 210 Ariz. 452, ¶¶ 8-9, 112 P.3d at 42. In light of this conclusion, we need not address Shulkin's additional argument that we should reject our decision in *May* that police officers can be qualified to perform blood draws and that blood draws may be performed outside a hospital environment under appropriate circumstances. *See id.* ¶¶ 9-10.

¶16 Affirmed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge